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Supreme Court of the United States

October Term, 1948.

ANTONIO CORRADO,
Libelant-Appellee,

AGAINST

PENNSYLVANIA RAILROAD COMPANY,
Respondent-Appellant.

Memorandum of Libelant-Appellee in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Statement.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner herein makes application to this Court for a Writ of Certiorari, the object of which is to review the final decree entered in the above entitled matter in the office of the Clerk of the United States District Court for the Eastern District of New York on May 21, 1948, and affirmed by the United States Court of Appeals, Second Circuit, November 29, 1948.

The action was brought to recover full indemnity by the libelant-appellee herein, a longshoreman who was injured in the course of his employment on the 6th day of September 1946, while engaged at work on a car-float afloat in New York Harbor.

An appeal was originally taken from the decree of the District Court to the United States Court of Appeals for the Second Circuit, which Court on the 29th day of November, 1948, affirmed the decree of the District Court made and entered as aforesaid (Hon. Augustus N. Hand writing opinion for the Court).

Facts.

The libelant-appellee, aged 64 years at the time of the accident out of which this controversy arises, had been in the employment of the Penn Stevedoring Co. for upwards of 14 years as a longshoreman (91 and 96).* This company regularly performed the stevedoring work for the Pennsylvania Railroad Company pursuant to contract (86).

At about 10:00 A. M. on September 6, 1946, the day of the accident, he and his fellow-workmen were ordered by their foreman to go to door No. 12 on Pier No. 29, North River, where carfloat No. 511 was moored, to assist in discharging the cars upon said float, of their merchandise, consisting of boxes of fruit and vegetables (90-102). They started to unload a New York Central freight car, located on the off shore side of the float, at the water end thereof. There were ten cars on the float—5 on the port side and 5 on the starboard side, there being a platform in the center separating the two rows of cars, to which platform the merchandise within the cars was being discharged and from thence trucked to the pier (100-102).

The pier superintendent or agent for the respondent-appellant had general supervision of the work performed by the stevedoring company, directing the stevedore to dischargo cargo from such cars as were designated by him (85).

The carfloat was brought over from the Jersey City terminus by Pennsylvania tug earlier in the A. M. and was

*Numerals in parentheses refer to folios of Record unless otherwise stated.

moored at Pier No. 29, North River (83), and after the float was brought to said pier by the Pennsylvania tug, the superintendent at the pier, in the employment of the respondent, directed the Penn Stevedoring Co. as to the location of the cars that were to be discharged of their contents (85). The foreman stevedore had nothing to do with the inspection of the cars on the float. This is done by the railroad inspectors when the cars are put on the float in Jersey City (205, 206).

The libelant did not open the door but two or three longshoremen opened the door on the platform side of the car in the presence of foreman stevedore Robert Green, who was respondent's witness (179-215). The foreman testified that he saw the defective door on the opposite side of the car and the possibility of harm arising therefrom in the event that an attempt was made to open it as soon as the door was opened (185-186; 201-202). Libelant testified that he did not assist in opening the door and that he did not know who opened the door (102) and denied that he had been warned (108 and 109).

The Court in its opinion says:

> "I do not believe that the foreman warned the libelant not to open the door" (226).

It is the custom and practice for the railroad inspector to mark doors if defective, as a warning to the stevedores, that something is wrong with the door and to avoid the same (116, 117 and 212).

There was no warning or notice on the door that fell (117).

It was customary for the men discharging the cars to open the doors whenever it became necessary, for light and air, and it was pretty hot in the freight car just before the accident happened (107, 213 and 214).

Libelant testified that the merchandise on the inside of the car was about six feet high or half way to the ceiling (104); that after a passageway was cleared from the platform door to the offshore door, he was asked by one of his fellow-workmen to open the offshore door (107); that he walked along the side of the car on the offshore side thereof up to the door, broke the seal and started to open the door and after moving it two or three inches, slowly the door came off, knocking him into the water (108-113); *that nobody at any time gave him any order or direction not to open the door* (108). Libelant testified that when he started to open the door he noticed that the rollers on the top of the door were missing although they were present at the bottom of the door (116).

That when he fell into the water, he was submerged and when he came up, he was underneath the door of the float; that he went down three times before he succeeded in grasping a line that had been thrown to his assistance (113, 114).

Opinion and Decision of the District Court on the Foregoing Facts.

(See fols. 217 to 240.)

The liability of the respondent-appellant for full indemnity as found by the Court is predicated upon three grounds (Opinion of the Court, 217 to 288, inc.) and Findings of Fact (230 to 236, inc.):

First: Upon the grounds that the respondent-appellant owed the libelant-appellee as an invitee or "business visitor" the non-delegable duty of seeing to it that the place wherein libelant-appellee was to work was reasonably safe at the time it was turned over to the stevedore, which duty respondent failed, as a matter of fact, to perform:

Grasso v. *Lorentzen,* 169 Fed. (2d) 27-29, cer. denied 326 U. S. 743;
Lauro v. *U. S. A.,* 162 Fed. (2d) 32-34.

SECOND: Upon the ground that the defective door constituted "unseaworthiness" of the vessel, which was the proximate cause of the libelant's injuries.

Seas Shipping Co. v. *Sieracki,* 328 U. S. 85.

THIRD: That the libelant was free from contributory negligence.

Questions Involved.

The ownership, operation and control of the car-float involved in the controversy is undisputed (219).

The libelant's employment by the Penn Stevedoring Co. and his presence as an invitee of the respondent herein is likewise undisputed.

The happening of the accident and the circumstances surrounding the same are likewise undisputed. The only contested questions before the Court were the alleged negligence of the respondent, the unseaworthiness of the vessel, and the freedom from contributory negligence on the part of the libelant, all of which questions were determined by the Court in favor of the libelant (Opinion of Matthew T. Abruzzo, *D. J.,* 217-228 inc. and the Findings of Fact and Conclusions of Law, 229-240, inc.).

The Decision of the United States Court of Appeals.

It will be noted that the United States Court of Appeals in affirming the decision of the District Court did not pass upon the question of the unseaworthiness of the car-float by reason of the defective box car door. Judge Hand, writing for the Court, says:

"It is unnecessary to decide whether a defect in one of the cars loaded on the float constituted unseaworthiness of the vessel. It may be argued that the car was only part of the cargo rather than a part of the equipment of the ship and that the defect was therefore not a basis for a finding of unseaworthiness. On the other hand, it may be argued that the defective car-door was analogous to the leaky tank which was considered by this court in *The G. R. Grove,* 294 Fed. 506, sufficient to render the vessel unseaworthy with respect to other cargo. Liability of the owner of the vessel to the libellant seems to be more appropriately rested upon negligence toward a business visitor than upon a doubtful extension of the doctrine of unseaworthiness to defects in the cargo or in a container of the latter. There is sufficient basis for liability because of failure to warn the libellant of a danger without invoking a theory of liability for personal injuries due to a species of unseaworthiness for which we are referred to no definite authority."

Instant Application.

In seeking a Writ of Certiorari, the respondent-appellant predicates its right thereto solely upon the grounds that the Court below erred in holding that a stevedore, who has accidently sustained personal injuries on board a vessel in navigable waters in the performance of his work, under circumstances involving no unseaworthiness of the vessel or her appliances, cannot lawfully obtain indemnity from the owner of the vessel upon the grounds that such negligence was caused by the owner or his agent, or servant (Petition for Writ, p. 4).

It will be noted that although the contention of the libelant-appellee that he was entitled to full indemnity

upon the grounds of (1) negligence, (2) unseaworthiness of the vessel (3) his freedom from contributory negligence, the United States Court of Appeals affirmed the District Court with respect to negligence and freedom from contributory negligence, but expressly eliminated from its decision the Findings of the District Court with respect to the unseaworthiness of the vessel.

The respondent-appellant contends that, no liability can be predicated upon the theory of negligence, and libelant-appellee, having failed to establish liability upon the theory of unseaworthiness of the vessel, the instant application is meritorious, and points out in support of its argument, that this Honorable Court intended by its decision in the case of *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, to deprive an injured longshoreman of any right to recover indemnity on the theory of negligence.

It will be noted that in the opinion of the United States Court of Appeals, this theory is untenable, viz.:

> "We cannot justify respondent's claim based on the decision in *Sea Shipping Co.* v. *Sieracki*, 328 U. S. 85, holding that a stevedore should be classed as a seaman and awarded full indemnity against the owner of his vessel if she was unseaworthy. That decision in no way precludes a stevedore from recovering damages suffered as a business invitee which were occasioned by the negligence of the ship- [fol. 96] owner. It is most improbable that the Supreme Court, in adding to the stevedore's remedies those open to ordinary seamen, intended to deprive them of other pre-existing remedies. The following language of Mr. Justice Rutledge's opinion (p. 101) in the latter case tends to show that such a remedy as is here invoked may still be pursued by a stevedore: 'Congress by [the Longshore-

men's and Harbor Workers'] Act not only did not purport to make the stevedore's remedy for compensation against his employer exclusive of remedies against others. It expressly reserved to the stevedore a right of election to proceed against third persons responsible for his injury * * *'

For the foregoing reasons the judgment is affirmed."

POINT I.

The decree in this case as affirmed by the United States Court of Appeals, Second Circuit, is sustained by the authorities in this court, as well as the numerous authorities throughout the country, and it is not affected by the ruling in the case of Seas Shipping Co. v. Sieracki, 328 U. S. 85.

It has always been the law that a longshoreman injured on a ship in the performance of his duties, is an invitee or a "business visitor", as to whom the owner owed the duty of reasonable care.

Restatement of the Law of Torts, Vol. II, 343;
Am. Jur., Vol. 48, Sec. 541, page 368;
Puleo v. *Moss & Co.,* 159 Fed. 2nd 842, 845, 291 U. S. 589;
Anderson v. *Lorentzen,* 160 Fed. 2nd 173;
Grasso v. *Lorentzen,* 169 Fed. 2nd 27-29; Cer. denied 326 U. S. 743;
Lauro v. *U. S.* 162 Fed. 2nd 32-34;
Warner v. *Goltra,* 293 U. S. 155;
Deluca v. *Shepard S.S. Co.,* 65 F. (2) 566, Cer. denied 291 U. S. 85.

Further citations would be abortive, as they all support this proposition. It is urged by the petitioner, however,

that since the final decree in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, was sustained on the ground that the libelant was a "seaman", then by a process of elimination, a recovery by a longshoreman of indemnity against a third party, to wit, the ship owner, could only be sustained on the ground of the alleged unseaworthiness of the vessel. In other words, that his Common Law remedies were wiped out by the *Sieracki* decision.

There is not the slightest intimation in the text of the opinion in the *Sieracki* case, that the U. S. Supreme Court intended by its decision to limit a recovery by a longshoreman for damages for personal injuries to a case where unseaworthiness is established.

The decision enlarged the rights of the injured longshoreman rather than curtailed them. It clearly was not the intention of the U. S. Supreme Court to limit them to a recovery solely on the grounds of unseaworthiness, which are very few compared with claims predicated upon the theory of negligence with respect to a "business visitor".

In the *Sieracki* case, there was no claim of negligence as a ground for recovery, and the only question before the Court was whether libelant, a longshoreman, could recover on the grounds of unseaworthiness, and it was held that he could. The Court did not have before it the question whether he could recover on the grounds of negligence towards a "business visitor", and therefore no reference is made one way or the other to this in the Court's decision.

The respondent argues that although a longshoreman is a "business visitor" and entitled, as has always been held, to recover against a third party on the plea of negligence, the decision in the *Sieracki* case, intentionally or otherwise, deprives him of this remedy. In other words, that a longshoreman who cannot establish that his injuries were

due to unseaworthiness, is entitled to no recovery against a third party howsoever negligent that third party may have been in the premises. This is unbelievable and most unjust.

The U. S. Court of Appeals says in its opinion, that the decision (in the *Sieracki* case) in no way precludes the stevedore from recovering damages suffered as a "business visitor" which were caused by the negligence of the ship owner—fol. 96. "It is most improbable that the U. S. Supreme Court, in adding to the stevedore's remedies, open to ordinary seamen, intended to deprive them of other pre-existing remedies", citing Justice Rutledge's opinion in the *Sieracki* case.

Under the theory of unseaworthiness of the vessel, the decision enlarged the rights of the longshoreman rather than limited them to the theory of unseaworthiness, which are very few generally speaking, compared with those where recovery is sought on the grounds of negligence. In the *Sieracki* case, the only question before the Court, was the question whether the evidence established the right to recover on the basis of unseaworthiness, which the Court answered in the affirmative. There was never any claim asserted by the libelant on the theory of negligence and therefore there was no question before the Court as to the right of the libelant to recover on that theory.

POINT II.

Even assuming that libelant can only recover full indemnity on the ground of the unseaworthiness of the vessel, the court below held that libelant was entitled to recover on both theories, and such finding was not in any way affected by the decision of the Court of Appeals, for the reason that the court has affirmed the decree on the theory of negligence, expressly refraining from consideration of the question of unseaworthiness.

CONCLUSION.

The Petition for Writ of Certiorari Should Be Denied.

Respectfully submitted,

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